NO. 21901

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT EDWARD GRAVENMIER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT

Appellant, Robert Edward Gravenmier (hereinafter referred to as "Gravenmier"), was indicted by the Federal Grand Jury for the Central District of California on February 15, 1967 [C.T. 2]. 1/ The indictment contained two counts alleging that on December 21, 1966, Gravenmier robbed Home Savings and Loan Association of Los Angeles, a Federally insured savings and loan association, and that on January 20, 1967, Gravenmier robbed the Crocker-Citizens National Bank, a bank insured by the Federal Deposit

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1/ "C.T." refers to Clerk's Transcript.

Insurance Corporation, in violation of Title 18, United States Code, Section 2113(a) [C. T. 2-3].

On February 20, 1967, Gravenmier was arraigned in Los Angeles, California, and at that time Mr. Bernard Winsberg was appointed counsel for Gravenmier. At the arraignment Gravenmier entered a plea of not guilty to both counts of the indictment and the matter was assigned to the Honorable Manuel L. Real, United States District Judge, for all further proceedings [C. T. 4]. On February 21, 1967, Gravenmier, with his counsel, appeared before Judge Real and his trial was set to commence on March 21, 1967 [R. T. 9]. 2/

On March 21, 1967, Gravenmier and his counsel appeared before the Honorable Manuel L. Real for jury trial. At this time Gravenmier, through his counsel, made an oral motion for a continuance of the trial [R. T. 6-8], and the motion was denied [C. T. 21 and R. T. 11]. The jury was impanelled and the trial commenced on March 21, 1967. On March 22, 1967, the trial was concluded. The jury returned a verdict finding Gravenmier guilty as charged in Count Two of the Indictment and announced that they were deadlocked and could not reach a decision concerning Count One of the Indictment [C. T. 52]. The Court rescheduled the case for March 27, 1967, for trial setting and re-trial of Count One [C. T. 52]. On March 27, 1967, the United States Attorney moved, and the Court ordered Count One of the Indictment dismissed [C. T.

2/ "R. T." refers to Reporter's Transcript.

54]. On April 24, 1967, Gravenmier was sentenced on Count Two of the Indictment to a term of 20 years in the custody of the Attorney General, said sentence to run concurrently with the sentence imposed in Case No. 36582-CD, in the United States District Court, Central District of California, then on appeal [C.T. 56].

On April 24, 1967, Gravenmier filed a notice of appeal [C.T. 55].

The jurisdiction of the District Court was based upon Section 2113(a) of Title 18, United States Code. This Court has jurisdiction to review the judgment of the District Court pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

SPECIFICATION OF ERRORS

1. Did the Court abuse its discretion in denying defendant's motion for a continuance, when said motion was made on the date of the trial, and allegedly for the purpose of locating witnesses whose identity was questionable and where there was no showing that these witnesses could be located?

2. Was the defendant deprived of effective representation by counsel so as to constitute a violation of his Sixth Amendment right to effective counsel, by the fact that certain alibi witnesses

were not produced at the trial?

III

STATEMENT OF FACTS

The First Count of the Indictment alleged that on December 21, 1966, Gravenmier robbed the Home Savings and Loan Association of $1,901.00. The Second Count of the Indictment alleged that on January 20, 1967, Gravenmier robbed the Crocker-Citizens National Bank of $1,102.00 [C.T. 2-3].

On February 20, 1967, Gravenmier was arraigned and the trial was set for Tuesday, March 21, 1967 [C.T. 4]. On or about March 14, 1967, counsel for plaintiff filed a trial memorandum with affidavit of service of said memorandum on defendant's counsel. On March 21, 1967, all parties appeared for jury trial before the Honorable Manuel L. Real, United States District Judge. At this time counsel for the defendant made an oral motion for a continuance. Counsel admittedly had failed to notice this motion or file any affidavits in support thereof as required by the local rules of the United States District Court, Central District of California [R.T. 8]. However, the defendant's counsel did state that he had orally notified the Assistant United States Attorney on Thursday, March 16, 1967, that he might seek a continuance. At that time Mr. Winsberg was notified that his motion for a continuance would be opposed [R.T. 9].

In support of his motion for a continuance defense counsel

stated that he had several cases set for trial on the same date and that all other defendants pled guilty [R. T. 6]. Counsel represented that prior to trial he had prepared a list of potential witnesses from names given by the defendant Gravenmier and that he had attempted to locate these persons [R. T. 7]. However, on inquiry from the court, counsel was vague as to what he had done to locate them, stating that he had attempted to call the one witness whose identity was known [R. T. 10]. Counsel also stated that he had relied upon the family and friends of the defendant as was his usual practice in preparing an indigent case, to locate alleged witnesses. Mrs. Gravenmier had spoken to one witness, but that witness would not come forward for an interview [R. T. 10]. Counsel admitted that he did not avail himself of the offices of the United States Attorney to locate these individuals, because in his opinion, it was advisable to withhold their names until they had been interviewed and their testimony evaluated [R. T. 11]. Counsel did state that when he was speaking of these witnesses, he was referring to three John Does and one individual whose name was known [R. T. 7]. Upon inquiry from the court, counsel stated that if he were to receive a continuance he would attempt to locate the witnesses and upon failing to do so, then, and only then would he be willing to disclose their identity to the United States Marshal or the United States Attorney for service of process as proof of good faith [R. T. 9-10]. The court denied the motion for a continuance on the grounds that because one of the witnesses had been contacted and would not come forward it appeared that there was not a sufficient showing

that the witnesses could ever be contacted for the trial [R. T. 11].

The Government first presented evidence to show that on December 21, 1966, Gravenmier did rob Home Savings and Loan Association. The evidence of this robbery consisted of four employees who positively identified Gravenmier as the man who robbed their place of employment [R. T. 70, 121, 145, 169]. On this count the jury was deadlocked and a mistrial was declared [C. T. 52]. The Government utilized the testimony of three witnesses to establish that on January 21, 1967, Gravenmier robbed the Crocker-Citizens National Bank as charged in the Indictment [R. T. 197, 201-202, 222-223 and 233]. The jury did find Gravenmier guilty as charged in the Indictment for this robbery [C. T. 52].

The defense consisted of Mrs. Gravenmier, wife of the defendant, testifying that defendant could not have robbed the Home Savings and Loan Association on December 21, 1966, because he was in her presence during all pertinent times. Mrs. Gravenmier testified that she was with the defendant and some people named Benny, Don and Kenny, during the time of this robbery [R. T. 248]. However, Mrs. Gravenmier claimed that she could not recall anything concerning the events of January 20, 1967, the date of the robbery of Crocker-Citizens Bank [R. T. 250]. Mrs. Gravenmier testified that she had no knowledge of the whereabouts of the defendant on that date [R. T. 250]. On cross-examination Mrs. Gravenmier testified that she had talked to a person named Don subsequent to her husband's arrest, and that

they discussed the case [R. T. 256]. Mrs. Gravenmier claimed that she had not seen Benny subsequent to her husband's arrest [R. T. 256].

At the conclusion of the trial on March 22, 1967, the jury returned a verdict of guilty on Count Two of the Indictment [C. T. 51]. The jury informed the court that they were unable to reach a decision on the guilt or innocence of Gravenmier on Count One of the Indictment, and a mistrial was declared [C. T. 52]. On March 27, 1967, pursuant to the motion of the United States Attorney, Count One of the Indictment was dismissed [C. T. 54]. On April 24, 1967, Gravenmier was sentenced to the custody of the Attorney General for a period of 20 years, said sentence to run concurrently with the sentence imposed in an earlier case then on appeal.

IV

ARGUMENT

A. THERE DOES NOT EXIST AN ABUSE OF THE TRIAL COURT'S DISCRETION IN DENYING A CONTINUANCE WHEN APPELLANT FAILED TO ESTABLISH THE IDENTITY OF ALLEGED WITNESSES, THE NATURE OF THEIR TESTIMONY, AND FAILED TO SHOW ANY PROBABILITY THAT THESE WITNESSES COULD BE PRODUCED WITHIN A REASONABLE TIME.

"The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. Avery v. Alabama, 308 U.S. 444. Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. Chandler v. Fretag, 348 U.S. 3. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied."

[Emphasis supplied.]

Ungar v. Sarafite, 376 U.S. 575 (1964), at 589.

The standard above mentioned for determining the scope of review on the question of whether a continuance should have been granted or denied is well established in the law of the Federal courts. The authorities are overwhelming in holding that the decision of the trial court will not be reversed unless it is clearly shown that there has been an abuse of the trial court's discretion in denying a continuance. See Isaacs v. United States, 159 U.S. 487, at 489 (1895); Joseph v. United States, 321 F. 2d 710 (9 Cir. 1963).

However, the present case presents an added obstacle in that there exists an effort to supplement the record with excerpts from certain letters written by Mr. Winsberg and Gravenmier, showing the existence of alibi witnesses. It is respectfully submitted that in reviewing the trial court's decision in this case, the appendix to the appellant's opening brief be stricken as being beyond the record and not a valid consideration to determine whether or not there exists an abuse of discretion. The courts are uniform in refusing to consider matters that are not properly part of the record of the case as designated by Rule 39, Federal Rules of Criminal Procedure. See United States v. Nash, 342 F. 2d 326 (6 Cir. 1965), and Smith v. United States, 343 F. 2d 539 at 541 (5 Cir. 1965).

The primary error in the appellant's contention that there is an abuse of discretion is found in the fact that at no time in the record of these proceedings were the alleged witnesses identified. In fact, they were specifically referred to by counsel for appellant

as three John Does and one person whose name was known [R. T. 7]. Counsel for appellant did state that one of the witnesses had been contacted by appellant's wife, and this witness had promised to come to Mr. Winsberg's office for interview. However, this witness apparently had no desire to testify in the trial, because he failed to meet with Mr. Winsberg and he could not be found [R. T. 10].

This obvious lack of ability to identify the alleged alibi witnesses clearly presents a sufficient basis in fact for the trial judge to exercise his discretion and deny the motion for a continuance. As the court held, the motion for a continuance is denied because it appears that it was not known whether the witnesses would ever be contacted [R. T. 11]. This precise ruling is found in Heflin v. United States, 223 F. 2d 371 (5 Cir. 1955), at 375, reversed on other grounds, 358 U. S. 415 (1959), wherein the court stated:

> "In the absence of a showing that appellant could probably locate and serve these witnesses within a reasonable time, it was within the trial court's discretion to refuse a continuance."

In another case with facts strikingly similar to those now before this Court it was held that there was no abuse of discretion to deny a motion for a continuance when the defendant was unable to locate two witnesses and that the third witness was either unable or unwilling to assist the defendant. See United States v. Hutchinson, 352 F. 2d 404 (4 Cir. 1965).

The rationale behind the above mentioned decisions is readily apparent when one considers the requirement that cases be brought to trial within a reasonable period of time and that there be some regulation of the court's own trial calendar. This is especially so when one considers that a trial cannot be continued forever in a vain attempt to contact witnesses whose identity is not even established by the defendant. Naturally, the trial court has the responsibility of protecting the rights of a defendant and allowing them to prepare their case adequately for trial. However, when a defendant has had four weeks to prepare a case for trial, and the witnesses have not been identified within that period of time, and without showing any facts that would indicate that they could be contacted, it cannot be said that there was an abuse of discretion in denying the motion for a continuance based upon those facts.

A second question is presented by appellant's contention that there was an abuse of discretion in not granting a continuance, and that is whether it was sufficiently shown in the record what testimony these witnesses would give which would necessitate a continuance. It is incumbent upon defendant to make an adequate showing as to the materiality of the testimony when seeking a continuance. See Sanchez v. United States, 311 F. 2d 327 (9 Cir. 1962) at 332.

The only representation provided the court as to the expected testimony was when counsel stated "According to the information supplied to me," [these witnesses] "establish the

existence of alibi." [R.T. 8]. There was no specific representation as to whether these alleged witnesses would establish an alibi for one or both counts of the Indictment. As the Court may recall, the first robbery was on December 21, 1966, and the second robbery was on January 20, 1967. The appellant was convicted only for the robbery occurring on January 20, 1967. The wife of appellant did provide an alibi for the first robbery. Mrs. Gravenmier also stated that Don, Kenny and Benny could corroborate this alibi [R.T. 248]. She testified on cross-examination that she had talked to a man named Don about this case [R.T. 256]. However, Mrs. Gravenmier was unequivocal in her answer that she had absolutely no knowledge of her husband's whereabouts for the robbery of January 20, 1967 [R.T. 250]. From this it would appear to follow that neither Mrs. Gravenmier nor the elusive Don had any knowledge of Gravenmier's whereabouts on the date of the robbery for which he was convicted. From the obvious lack of any showing in the record it would appear that appellant has clearly failed to establish the facts showing the materiality of the testimony of the missing witnesses in that there is no showing that they would provide an alibi for the robbery for which Gravenmier was convicted and is presently incarcerated.

Considering that the trial court's decision must be tested only on whether or not it has in fact abused its discretion in granting or denying a continuance, it is respectfully submitted that the record is overwhelming in support of the trial court's decision to deny a continuance. This determination can only be

made from the facts presented at the time the motion was made. The necessity of regulating the trial calendar and respecting a defendant's rights must be considered in the light that at the time this motion was brought a jury panel was present, the Government's witnesses were present, and the defendant had failed to give any proper notice that the motion was going to be brought [R. T. 8]. Once the motion was made orally, the lack of any specificity must be attributed to a lack of knowledge of any facts because Gravenmier was present and if the identity of witnesses was known to him at that time he could have supplied that information to Mr. Winsberg. Unfortunately, appellant's present counsel appears to ignore the fact that the identity or testimony of these alibi witnesses could have been wishful thinking and it was not until after conviction that added thought was put into appellant's efforts to escape his just incarceration.

Appellant relies heavily on Scott v. United States, 263 F. 2d 398 (5 Cir. 1959), where the missing witness was one named Bard who had been a codefendant, and in this case the defense counsel fully established that he had done all that could be required to obtain Bard's appearance at the trial. Furthermore, in contrast to the present case, the identity of the witness was known, and his intimate involvement was well established by the fact that he had been indicted for the same transaction. This is not at all similar to a case where the identity of the witnesses is questionable, that only a bare conclusion is given as to the materiality of their testimony, and that the only known witness had appeared unwilling

to come forward and testify.

B. A REVIEW OF THE RECORD CLEARLY ESTABLISHES THAT APPELLANT'S COUNSEL WAS OF SOUND QUALITY AND THAT THE ALLEGED ERROR OF INEFFECTIVE COUNSEL IS WITHOUT MERIT.

Appellant alleges that he was denied his constitutional right to effective counsel, because his counsel did not produce alleged alibi witnesses at the trial. Again, it is respectfully submitted that this question must be determined by the record of the trial as submitted to the Court of Appeals. See United States v. Nash, supra, and Smith v. United States, supra. Appellant has provided selected excerpts from letters written after the conviction by Gravenmier and his trial counsel, Mr. Winsberg. These letters are utilized to supplement the record and should be stricken. The Court of Appeals is not the proper forum to make an evidentiary decision on the truth of the statements asserted therein.

The frequently articulated test used to determine whether or not a defendant has received effective counsel is whether the " . . . attorney's conduct was so incompetent that it made the trial a farce." Dodd v. United States, 321 F. 2d 240 (9 Cir. 1963); Stanley v. United States, 239 F. 2d 765 (9 Cir. 1957). In making this determination, the Court is to review the entire record to determine whether counsel had done a workmanlike job. Sherman v.

United States, 241 F. 2d 329 (9 Cir. 1957), at 336. As it was stated in Brubaker v. Dickson, 310 F. 2d 30, at 37 (9 Cir. 1962):

> "This does not mean that trial counsel's every mistake in judgment, error in trial strategy, or misconception of law would deprive an accused of a constitutional right. Due process does not require 'errorless counsel, and not counsel judge ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.' Determining whether the demands of due process were met in such a case as this requires a decision as to whether 'upon the whole course of the proceedings,' and in all the attending circumstances, there was a denial of fundamental fairness; it is inevitably a question of judgment and degree."

A review of the entire record in this case clearly shows that lack of the alibi witnesses did not reduce this trial to a mockery of justice or a farce. As Mr. Winsberg represented to the court, he knew the identity of only one person who was a potential alibi witness. That Mrs. Gravenmier had contacted this witness and that the witness was apparently not willing to come forward [R. T. 7, 10]. The record also shows that Mr. Winsberg did attempt to telephonically contact this person, without success [R. T. 10].

It is not difficult to understand Mr. Winsberg's reluctance to provide the United States Attorney with the name of a possible

witness, when there could well exist reasons to believe the witness did not want to testify. There is always the possibility that the witness may possess damaging testimony. An example of damaging testimony would be if the witness had participated in the robbery as a driver or in some other role. Also, as a matter of trial strategy, Mr. Winsberg knew that Mrs. Gravenmier would provide an alibi for the December 21, 1966, robbery. An appraisal of the Government's evidence will show that four employees positively identified Gravenmier, and that there existed photographs of the robbery [R.T. 70, 121, 145, 169; R.T. 68-69]. However, on the second robbery, there were fewer identification witnesses and therefore an attorney could hope to discredit the identification. If a second alibi was presented, this would tend to weaken the credibility of the first alibi witness because the coincidence of two alibis would leave the witnesses more vulnerable to attack and the jury may reject all evidence.

Another factor that appellant's counsel apparently fails to appreciate is that Mr. Winsberg could have known facts that would clearly establish that the alibi would be a fabrication. Mr. Winsberg has no duty to consciously utilize perjured testimony, and in fact he would develop his own problems if he became involved in the use of perjured testimony. It appears patently unfair to attack the competence of Mr. Winsberg for not producing these alleged alibi witnesses, when a number of sound reasons exist for conducting the trial in the manner shown by the record.

As previously mentioned, the test for competency of counsel

requires a review of the entire record to determine whether counsel did a workmanlike job, or if his efforts were of such low caliber to reduce the trial to a farce. Sherman v. United States, supra. A review of the Reporter's Transcript will show that Mr. Winsberg was very skilled in attacking each identification witness, and his overall demeanor and conduct of the trial is a credit to the legal profession. While we cannot know precisely what Mr. Winsberg thought when he made a number of strategy decisions, the record clearly demonstrates that he is an attorney of experience and skill. From this record, there exists substantial evidence to believe that Mr. Winsberg's strategy decisions were soundly made and in the best interest of his client. It is interesting to note that the entire record is void of any fact indicating that Mr. Gravenmier was dissatisfied with his counsel.

It is respectfully submitted that to determine that appellant was deprived of effective counsel would be contrary to the test established for determining effective counsel, and would establish a dangerous precedent. The danger would be that if counsel's strategy can be judged by hindsight, there could hardly be a conviction that would not be endangered. Also, to explain every strategy decision in a trial record would penetrate into the private conferences between an attorney and his client. The conduct of counsel in this trial is shown by the record to be of a high standard and appellant did receive full and competent legal counsel throughout the trial.

Appellant argues at great length that the facts of the present

case are strikingly similar to the facts found in MacKenna v. Ellis, 280 F. 2d 592 (5 Cir. 1960); reh. den. and opinion modified 289 F. 2d 928 (5 Cir. 1961), cert. den. 368 U.S. 877 (1961). A number of significant factual differences exist between the plight of Mr. MacKenna and that of Gravenmier. In the first place, MacKenna objected in open court to the appointment of counsel when he was making arrangements to hire counsel (Id. at 595, 598). The length of time allowed for preparation of the trial differs greatly. MacKenna first appeared in court on September 28, 1956, and the trial was scheduled for October 3, 1956. However, the trial was advanced to October 2, 1956, without prior notice to MacKenna. In the present case Gravenmier had approximately thirty days' notice of trial as opposed to MacKenna's six. Thirdly, Gravenmier's alibi witness had been contacted and was not willing to come forward [R. T. 7], whereas, MacKenna's witnesses were all known and were willing to testify. MacKenna was able to provide affidavits from his alibi witnesses showing their testimony, but no one has ever submitted any statement under oath concerning Gravenmier's alleged alibi witnesses. Fourth, Gravenmier's silence certainly indicates a satisfaction with counsel's conduct of the trial, whereas, MacKenna protested to the court for a continuance and counsel of his choice.

Based upon the aforementioned facts, it is submitted that the MacKenna case, supra, does not support appellant's position.

C. THE APPELLANT'S ATTACHMENT OF THE EXCERPTS OF CERTAIN LETTERS TO THE BRIEF FOR THE PURPOSE OF CORROBORATING CERTAIN ALLEGATIONS IS OBJECTED TO AND SHOULD BE STRICKEN AS BEING IN VIOLATION OF THE RULES OF THE COURT AS NOT CONSTITUTING A VALID PART OF THE TRIAL RECORD IN THIS CASE.

The appellant has filed an appendix to this brief which contains certain excerpts of letters written by Mr. Winsberg and Gravenmier subsequent to the conclusion of the trial. The attempt to supplement the brief in this fashion is objected to and the appendix should be stricken. It appears patently unfair to attempt to corroborate allegations against the trial court's handling of this case by submitting portions of letters which constitute hearsay from the appellant and his former trial counsel. There is no way to determine what the additional portions of these letters say and it appears that a number of the quotes used show that they are not in context. Furthermore, the allegations that are presented in these excerpted letters are not statements that were made under oath, they are not statements that were brought to the attention of the trial court and their only obvious purpose is an attempt to persuade the appellate court that the allegations do have merit, because the record of the trial is void of any support for appellant's contentions.

Rule 39 of the Federal Rules of Criminal Procedure states:

"(b). The Record on Appeal.

"The rules and practice governing the preparation

and form of the record on appeal in civil actions shall apply to the record on appeal in all criminal proceedings, except as otherwise provided in these rules."

A review of the Federal Rules of Criminal Procedure reflect that there is no exception authorizing an appellant to file portions of letters written by the appellant to his attorney as representing fact to be utilized in the argument of an appeal. Rule 75(a), Federal Rules of Civil Procedure, defines what documents constitute the record on appeal:

"The original papers and exhibits filed in the District Court, the transcript of the proceedings, if any, and a certified copy of the docket entries prepared by the Clerk of the District Court shall constitute the record on appeal in all cases."

A review of the Federal Rules of Civil Procedure will also show that there is no provision enabling an appellant to take selected portions of letters and enable him to make them a part of a record on appeal.

In Appellant's Opening Brief at page 18, there is an attempt to justify the addition of these letters contending: "But the appellant's allegations of fact outside the record must be considered." However, the authorities cited by appellant to support this alleged proposition of law are not on point because both of these cases were appeals from denials of habeas corpus and the petition filed therein contained the alleged facts of the

constitutional violations. As this Court and appellant are undoubtedly aware, a petition seeking habeas corpus is part of the record for those proceedings. It is respectfully submitted that these cases do not in any way support appellant's contention that he is authorized to file an appendix by placing into evidence the excerpts of certain letters that were written after the conclusion of the trial by appellant and Mr. Winsberg to counsel for the appeal. It is further respectfully submitted, that because of this flagrant violation of the rules of this Court that the statements contained in those letters not be considered, and that they be stricken for the purposes of this appeal. See United States v. Nash, 342 F. 2d 326 (6 Cir. 1965).

However, because these unsworn statements have been presented as an appendix to appellant's brief, appellee seeks leave to comment upon the contents of those letters, but in no way is this to be construed as an acceptance of these letters as a part of the record or a retraction of the contention that these letters should be stricken. The four letters submitted are: (1) Gravenmier's letter dated September 22, 1967; (2) Winsberg's letter dated September 27, 1967; (3) Gravenmier's letter dated January 31, 1968; and (4) Winsberg's letter dated January 30, 1968. It is now apparent from the content of these letters that appellant alleges that certain names were made available that would provide an alleged alibi for Count Two of the Indictment, the count upon which Gravenmier stands convicted. Mr. Winsberg, in open court, stated that he knew the identity of only one of the witnesses and that the others were addressed to as John Does [R. T. 7]. However, in Winsberg's

letter of September 27, 1967, some six months after the conclusion of the trial, it is stated Winsberg was given a name of Kenneth Shea, Benny, and Don Wallin. This letter fails to state what information these individuals could provide for the robberty alleged in Count Two, and in fact they mention a reluctance of Mr. Shea to come forward and testify in the case. Gravenmier's letter dated January 31, 1968, alleges that there does exist alibi witnesses for Count Two, and he identifies these witnesses as a Kenneth Shea, Frank Shea, and a man whose name is unknown to Gravenmier. It must be recalled that Mr. Winsberg in open court and in the presence of Mr. Gravenmier, represented that only one man had been contacted by anyone concerning the testimony in this case, and that person had been contacted by Mrs. Gravenmier. It was further represented to the Court that the man contacted by Mrs. Gravenmier was not forthcoming [R.T. 7 and 10]. If Gravenmier had in fact talked to Kenneth Shea on two occasions, as he now alleges, he certainly could have corrected Mr. Winsberg who could have made that representation to the court and this fact could have been utilized in argument for a continuance, if in fact this did happen. Consistent with Mr. Winsberg's representation in open court that only one witness had been contacted in connection with this case, Mrs. Gravenmier admitted that she had spoken to a man named Don [R.T. 256]. According to Gravenmier's letter of January 31, 1968, Don was not even present and, therefore, could not be an alibi witness on the second robbery. It is readily apparent that Gravenmier and his counsel do not agree on what

persons would provide an alibi for the Second Count of the Indictment.

In addition to the above mentioned contradictions in names and the basic lack of consistency among the letters as to who would be the alibi witnesses for the count upon which Mr. Gravenmier was convicted, a second consideration is respectfully submitted to this Court for consideration. That is, that throughout the trial and to date no one has been willing to make any statement as to Mr. Gravenmier's whereabouts on January 20, 1967, or even to the existence of alibi witnesses under oath either directly in court or by affidavit. This same policy of refusing to put forth any affirmative information about these witnesses and the nature of their testimony has permeated this entire record and should be considered in determining whether or not this is a fabrication. It is also inconceivable that counsel for appellant would assume that excerpts of letters written after the trial should be sufficient to buttress the record, especially when the entire contents of these letters are not disclosed. If this Honorable Court does not follow appellee's request and strike these hearsay, self-serving statements that are beyond the record from appellant's brief, then it should certainly be considered that the inconsistencies contained therein and the obvious reluctance to utilize affidavits or statements under penalty of perjury is sound evidence to indicate that the entire alibi story being put forth by appellant is a fabrication and does not entitle the appellant to relief.

V

CONCLUSION

For the reasons stated in the argument the judgment of the District Court should be affirmed.

Respectfully submitted,

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Assistant U. S. Attorney,
Chief, Criminal Division,

DENNIS E. KINNAIRD,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Dennis E. Kinnaird

DENNIS E. KINNAIRD